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No. _____

IN THE

Supreme Court of the United States

TIME WARNER ENTERTAINMENT COMPANY, L.P.
D/B/A TIME WARNER CABLE,
Petitioner,

v.

NATIONAL SATELLITE SPORTS, INC.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

RICHARD W. CLARY
GARY A. BORNSTEIN
CRAVATH, SWAINE & MOORE
Worldwide Plaza
825 Eighth Avenue
New York, NY 10019
(212) 474-1000

MARC APFELBAUM
JEFFREY M. ZIMMERMAN
CRAIG A. GOLDBERG
TIME WARNER CABLE
290 Harbor Drive
Stamford, CT 06902
(203) 328-0600

HENK BRANDS
Counsel of Record
COLIN S. STRETCH
KELLOGG, HUBER, HANSEN, TODD & EVANS, P.L.L.C.
1615 M Street, N.W.
Suite 400
Washington, D.C. 20036
(202) 326-7900

PAUL T. CAPPUCCIO
EDWARD J. WEISS
AOL TIME WARNER INC.
75 Rockefeller Plaza
New York, NY 10019
(212) 484-8000

Counsel for Petitioner

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QUESTIONS PRESENTED

1. Whether, under federal principles of collateral estoppel, a district court holding, though otherwise entitled to collateral-estoppel effect, should be denied such effect if it was one of two or more alternative, independently sufficient, holdings.

2. Whether a company holding a contractual right to exhibit particular satellite-delivered television programming in commercial establishments has standing to bring an action under a federal communications-piracy statute, 47 U.S.C. § 605, against a cable operator that, having a contractual right to receive an entirely separate satellite feed of the same programming for retransmission to residential subscribers, inadvertently provides it to a commercial establishment.

LIST OF PARTIES TO THE PROCEEDINGS AND CORPORATE DISCLOSURE STATEMENT

Petitioner Time Warner Entertainment Company, L.P. d/b/a Time Warner Cable was a defendant and the appellant in the proceedings below.

Respondent National Satellite Sports, Inc., was the plaintiff and the appellee in the proceedings below.

Eliadis, Inc., d/b/a Melody Lane Lounge, Gust Eliadis, and Jack McHelson were defendants in the district court but did not participate in the proceedings before the Sixth Circuit.

Pursuant to Rule 29.6 of the Rules of this Court, petitioner states as follows:

Time Warner Entertainment Company, L.P., is a Delaware limited partnership. The general partners in Time Warner Entertainment Company, L.P., each are directly or indirectly wholly owned by AOL Time Warner Inc., a publicly held company. An ownership interest of more than 10 percent in Time Warner Entertainment Company, L.P., is directly or indirectly held by AT&T Corp., a publicly held company.

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

Time Warner Entertainment Company, L.P. ("Time Warner"), respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit.

The court of appeals declined to give collateral-estoppel effect to one of two alternative grounds in a prior federal district court judgment between the same two parties. In so ruling, the court of appeals (as it acknowledged in its opinion) placed itself squarely in conflict with the D.C., Second, and Ninth Circuits, which have held that *each* alternative ground is a basis for estoppel. In denying preclusive effect, the Sixth Circuit sided with the Fourth, Seventh, and Tenth Circuits, which have held that *neither* alternative ground is a basis for estoppel. The Sixth Circuit purported, however, to adopt a third approach, under which a "primary" alternative ground may still be entitled to preclusive effect, but a "secondary" alternative ground is not. The decision below thus deepens a

fully developed conflict of authority. This case presents an ideal vehicle to resolve the conflict and to establish a uniform federal rule.

Review is particularly warranted because the court of appeals' refusal to accord preclusive effect to alternative holdings is incorrect and undermines the very purposes of collateral estoppel: to relieve courts and litigants of the burdens of multiple lawsuits, and to prevent inconsistent decisions on the merits (as occurred here). The arguments that have been mustered in support of denying collateral-estoppel effect to alternative holdings are unpersuasive. *First*, preclusion cannot be withheld on the theory that it is unfair to bind the losing litigant to a holding that, in the presence of an unassailable alternative holding, cannot successfully be appealed. Alternative grounds *can* be appealed, and a losing litigant has every incentive to do so. There is thus no unfairness, let alone so much as to justify the countervailing unfairness of compelling the prevailing litigant to suffer a do-over lawsuit. *Second*, preclusion cannot be withheld on the theory that district courts do not give alternative grounds careful consideration. It is settled law that alternative grounds — even "secondary" ones — are entitled to full *stare decisis* effect. If the supposed concern about careful consideration is not sufficiently strong to deny *stare decisis* effect, it cannot be strong enough to deny collateral-estoppel effect. *Finally*, the Sixth Circuit's "primary"/"secondary" approach suffers from a flaw in addition to those described above: it is so indeterminate as to be unworkable.

This Court should also grant review of a second issue wrongly decided by the court of appeals. The court of appeals held that a company holding a contractual right to exhibit particular satellite-delivered television programming in commercial establishments has standing to bring an action under a federal communications-piracy statute, 47 U.S.C.

§ 605, against a cable operator that, having a contractual right to receive an entirely separate satellite feed of the same programming for retransmission to residential subscribers, inadvertently provides it to a commercial establishment. That holding is mistaken: such a stranger to the diverted communication is not within the zone of interests protected by Section 605. The court of appeals' contrary view wrongly creates a federal forum (in which attorneys' fees, liquidated damages, and a strict liability standard are available) for disputes that previously were only of state concern. The court of appeals' erroneous decision is thus of broad significance: it not only dramatically increases cable operators' cost of doing business by creating a federal mandate of infallibility, but also threatens to burden the federal judiciary with countless disputes that properly belong in state court.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-29a) is reported at 253 F.3d 900. The opinion of the district court (Pet. App. 30a-43a) is reported at 65 F. Supp. 2d 662.

JURISDICTION

The court of appeals entered its judgment on June 11, 2001, and denied a petition for rehearing en banc on August 9, 2001 (Pet. App. 60a). On November 2, 2001, Justice Stevens extended the time for filing a petition for a writ of certiorari to and including December 7, 2001. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

Section 705 of the Communications Act of 1934, 47 U.S.C. § 605, is set forth at Pet. App. 69a-76a.

STATEMENT

1. On December 14, 1996, Riddick Bowe fought Andrew Golota in a championship boxing match in Atlantic City, New Jersey. The promoter of the match, Main Events, granted different parties the rights to provide a telecast to different audiences. Main Events licensed the right to provide the match to *residential* viewers to Viewer's Choice. Viewer's Choice sub-licensed its rights to cable operators around the country, including petitioner Time Warner. Main Events licensed the right to provide the match to *commercial* establishments to Entertainment by J&J, Inc., which sub-licensed respondent National Satellite Sports, Inc. ("NSS") to sell the fight to commercial establishments in certain parts of the country, including Ohio. Time Warner marketed the match to residential customers for a pay-per-view fee of $39.95. NSS marketed the match to commercial establishments for fees of $1,000 or more.

Although residential and commercial customers ordering the fight received the same programming, the electronic video signals were distinct. The signal originating in Atlantic City was split into two separate satellite feeds, one of which was transmitted to cable operators like Time Warner, which then retransmitted it over their local cable systems. *See* Pet. App. 3a. The other (commercial) satellite feed was beamed directly to commercial establishments' reception antennas (*e.g.*, the rooftop satellite dishes commonly seen on sports bars). Either way, the signals arrived at the customer's premises in scrambled format, and only paying customers were permitted to unscramble it.[1]

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[1] *See, e.g., Time Warner Cable of New York City v. Taco Rapido Restaurant*, 988 F. Supp. 107, 109 (E.D.N.Y. 1997); *Time Warner Cable of New York City v. Freedom Elecs., Inc.*, 897 F. Supp. 1454, 1456 (S.D. Fla. 1995).

Some time before the match, Time Warner began providing cable service to a bar in Massillon, Ohio, called the Melody Lane Lounge. Although Time Warner provides cable service to commercial establishments, it does not allow them to order pay-per-view programming, because the terms of its contracts with programming providers ordinarily do not permit such service. The Melody Lane Lounge's proprietor had ordered service in his own name, however, and Time Warner's records listed the account as residential. Accordingly, when a Melody Lane bartender contacted Time Warner to order the pay-per-view match, Time Warner allowed the event to be descrambled and exhibited. *See id.* at 4a.

When NSS found out, it sued Time Warner in the United States District Court for the Northern District of Ohio. Although the crux of NSS's complaint was that Time Warner went beyond the scope of the contract with its programming supplier when it provided the programming to the Melody Lane Lounge, NSS did not bring a state-court contract action (say, as a third-party beneficiary of the contract between Time Warner and Viewer's Choice or directly against Entertainment by J&J or Main Events). Instead, NSS sued Time Warner in federal district court, claiming that the exhibition of the fight in the Melody Lane Lounge violated a federal statute, 47 U.S.C. § 605(a).

The relevant part of Section 605(a) — its first sentence — provides: "[N]o person receiving, assisting in receiving, transmitting, or assisting in transmitting, any interstate or foreign communication by wire or radio shall divulge or publish the existence, contents, substance, purport, effect, or meaning thereof, except through authorized channels of transmission or reception, . . . to any person other than the addressee." *Id.* Under the statute, suit may be brought in federal district court by "[a]ny person aggrieved." *Id.* § 605(e)(3)(A). The statute further provides that "the term

'any person aggrieved' shall include any person with proprietary rights in the intercepted communication." *Id.* § 605(d)(6). Finally, the statute provides that a prevailing party is entitled to statutory damages and attorneys' fees. *See id.* §§ 605(e)(3)(B)(iii), 605(e)(3)(C)(i)(II).

Time Warner defended against NSS's Section 605 claim by (among other things) pointing out that the signal that Time Warner had received and inadvertently provided to the Melody Lane Lounge was entirely separate from the satellite signal that had been provided to NSS's commercial customers. Thus, Time Warner argued, even assuming it had violated Section 605(a) by providing a cable signal to the Melody Lane Lounge beyond the limits of its contract with Viewer's Choice, NSS — as a complete stranger to the residential signal — could not claim standing as a "person aggrieved" simply because it might otherwise have sold the Melody Lane Lounge the separate commercial signal. Moreover, Time Warner argued, it had not in fact violated the first sentence of Section 605(a), as it had provided its signal "through authorized channels of transmission" to its own "addressees."

2. While the instant litigation was pending in the district court, a different judge of the same court considered a similar suit between the same parties. *See* Pet. App. 5a-6a. In that suit, too, NSS had sued Time Warner in connection with a boxing match (Evander Holyfield vs. Bobby Czyz) that Time Warner was authorized to provide to residential cable subscribers and that NSS was authorized to sell to commercial establishments. And there, too, NSS alleged that Time Warner had violated Section 605(a) by inadvertently allowing the match to be shown in a commercial establishment (a tavern in Akron, Ohio, called "Coach's Corner"). And there, again, NSS claimed standing even though Time Warner and NSS each provided separate signals to their customers. In short, although the second case involved a different boxing

match and a different bar, the parties and the issues in the litigation were identical.

The Coach's Corner case went to judgment before the Melody Lane case. *See id.* at 61a-68a. Ruling from the bench just prior to the start of trial, the Coach's Corner court held that Time Warner was entitled to summary judgment for two reasons. *See id.* at 64a ("There are two bases for the decision."). *First*, the court held that NSS's contract with the company that had sub-licensed it the right to exhibit the match denied NSS the right to sue third parties. *See id.* at 64a-66a.[2] *Second*, the court held that NSS lacked standing to sue under Section 605. *See id.* at 64a, 66a. As the court noted, "the communication at issue [which NSS claimed that Time Warner had wrongfully divulged to a bar] was the [residential] feed and not the [commercial] feed which was what . . . [NSS] had an interest in." *Id.* at 66a. "And based upon . . . those undisputed facts," the court explained, "plaintiff has failed to state a Section 605 claim as an aggrieved person." *Id.*

Although the instant case was pending at the same time, NSS declined to appeal the Coach's Corner decision. *See id.* at 6a. It accordingly became final.

3. After the Coach's Corner decision, Time Warner filed a motion for summary judgment in the instant case concerning the Melody Lane Lounge. As Time Warner explained, the Coach's Corner case involved the same parties and the same "person aggrieved" standing issue as the instant case. Accordingly, Time Warner argued, basic principles of collateral estoppel dictated that the Coach's Corner judgment be given preclusive effect. The district court, however,

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[2] NSS's contract in the Coach's Corner case was different from its contract in the Melody Lane case. The latter contract did not prohibit NSS from suing third parties.

denied Time Warner's motion, granting NSS's cross-motion for summary judgment instead. *See id.* at 30a.

According to the district court, the Coach's Corner court's holding on Section 605 was not entitled to preclusive effect because it was not "essential to the judgment." *See id.* at 37a. This was so, the district court said, because the Coach's Corner court "first concluded . . . that National Satellite had failed to state a claim because it had entered into a contract [that] specifically provided that National Satellite had no right to pursue a piracy action." *Id.* Although the court acknowledged that the Coach's Corner court "further held that . . . National Satellite had failed to state a claim under § 605," it said that "[t]his second basis for the holding was not essential to the judgment, since, in the court's view, the contractual language clearly barred the action." *Id.*

The district court went on to reject Time Warner's standing defense. It noted that Section 605(d)(6) defines "person aggrieved" to "*include* any person with proprietary rights in the intercepted communication," and "does not state that *only* such persons are 'aggrieved' for purposes of § 605." *Id.* at 38a (internal quotation marks omitted). Thus, the court held, "[i]t stands to reason . . . that persons other than those with 'proprietary rights in the intercepted communication' may also be able to state a claim under § 605." *Id.* at 39a. Besides, the court added, "since plaintiff had the exclusive right to send the Event signal to commercial establishments, a proprietary interest of some sort on the part of plaintiff arose at the moment when defendant transmitted the Event to Melody Lane Lounge." *Id.* at 39a n.5.

On the merits, the district court held that "[t]here can . . . be a violation of § 605(a) in the context of a cable television communication even if the violator receives a communication signal that it is legally entitled to receive, if it then diverts or sends the communication to an entity that is not entitled to the

communication." *Id.* at 39a-40a. In particular, the court held, Time Warner "transmitted the Event to Melody Lane Lounge through an unauthorized channel of transmission (defendant was not authorized to transmit the Event to commercial establishments)." *Id.* at 41a. Although only 23 patrons had been present in the Melody Lane Lounge during the match, *see id.* at 4a, 48a, and although the Melody Lane Lounge would not have ordered the match at the applicable commercial pay-per-view rate of roughly $1,000, *see id.* at 4a, 49a, the court awarded NSS $4,500 in damages and more than $26,000 in attorneys' fees and costs, *see id.* at 5a, 28a-29a, 53a, 58a.

4. The court of appeals affirmed. Although it found each of the other prerequisites for collateral estoppel satisfied, the court agreed with the district court that the Coach's Corner court's Section 605 holding was not "necessary to the outcome." *Id.* at 13a. The court acknowledged that a number of courts of appeals have held that "a plaintiff is precluded from relitigating an issue actually decided against it in a prior case, even if the court in the prior case rested its judgment on alternative grounds." *Id.* at 11a (internal quotation marks omitted) (citing *Williams v. Ward*, 556 F.2d 1143, 1154 (2d Cir.), *cert. dismissed*, 434 U.S. 944 (1977); *Magnus Elecs., Inc. v. La Republica Argentina*, 830 F.2d 1396, 1402 (7th Cir. 1987); *In re Westgate-California Corp.*, 642 F.2d 1174, 1176 (9th Cir. 1981); and *Yamaha Corp. of Am. v. United States*, 961 F.2d 245, 255 (D.C. Cir. 1992), *cert. denied*, 506 U.S. 1078 (1993)). According to the court, however, this view was "counterbalanced by courts and commentaries that have adopted the opposite conclusion" — namely, that, "[i]f a judgment of a court of first instance is based on determinations of two issues, either of which standing independently would be sufficient to support the result, the judgment is not conclusive with respect to either issue

standing alone." *Id.* at 11a-12a (internal quotation marks omitted) (citing *Arab African Int'l Bank v. Epstein*, 958 F.2d 532, 535 (3d Cir. 1992); *Ritter v. Mount St. Mary's College*, 814 F.2d 986, 993-94 (4th Cir.), *cert. denied*, 484 U.S. 913 (1987); *Peabody Coal Co. v. Spese*, 117 F.3d 1001, 1008 (7th Cir. 1997) (en banc); *Baker Elec. Coop. v. Chaske*, 28 F.3d 1466, 1475-76 (8th Cir. 1994); and *Turney v. O'Toole*, 898 F.2d 1470, 1472 n.1 (10th Cir. 1990)).

In the court of appeals' view, the issue was "a close one given the policy implications involved." *Id.* at 12a. On the one hand, the court observed, failure to give preclusive effect would leave a party "free to relitigate" an issue on which it had already met with defeat — a result that would directly contradict basic principles of finality and fairness. *Id.* On the other hand, the court said, affording preclusive effect to alternative holdings might be unfair to the losing litigant in that the precluded party might be deprived of a practical opportunity to appeal. *See id.* This was so, according to the court, because, if one of the district court's alternative holdings was clearly correct, appealing the other might be pointless. *See id.* at 12a-13a. In the end, the court stated without further elaboration that the latter consideration outweighed the former. *See id.*

Having thus concluded that it should deny preclusive effect, the court of appeals nevertheless purported not to "find it necessary to fully resolve this issue at the present time." *Id.* at 13a. This was so, the court said, because the Coach's Corner ruling on Section 605 was "overshadowed" by what the court described as the more extensive discussion "outlining the contractual obstacles that prevented NSS from suing Time Warner." *Id.* Believing that the relative prominence of the contractual holding should make a difference, the court purported to formulate a new test, describing its holding as follows: "where, as in *Coach's Corner*, one ground for the

decision is clearly primary and the other only secondary, the secondary ground is not 'necessary to the outcome' for the purposes of issue preclusion." *Id.*

The court of appeals next rejected Time Warner's Section 605 standing objection, substantially agreeing with the district court's reasoning. *See id.* at 15a-21a. Thus, the court stated that the "explicit reference to a subset of persons aggrieved" following the word "include" in Section 605(d)(6) "was not intended to exclude others who sustain injuries from a violation of any of the prohibitions originally listed in § 605(a)." *Id.* at 18a-19a. In addition, the court pointed to legislative history that, it said, supported the view that, in adding the definition of "person aggrieved" to the statute in 1988, Congress sought to expand, not contract, statutory standing. *See id.* at 16a-19a. From that, the court without more concluded that the district court "did not err in determining that NSS had standing to sue Time Warner under § 605." *Id.* at 21a.

The court of appeals further agreed with the district court that the first sentence of Section 605(a) is violated when a cable operator makes programming available to subscribers who, under the agreement between the cable operator and its programming supplier, are not supposed to receive it. In the court's view, whether the Melody Lane Lounge was a "person other than the addressee" for purposes of Section 605(a) turned on the intent of the programming supplier — not the intent of the cable operator. *See id.* at 27a ("the first sentence of § 605(a) . . . looks at the relationship between the original sender and the ultimate receiver in determining whether the communication is authorized"). The court acknowledged that the practical effect of its holding was "a federal mandate of infallibility on the part of cable operators," *id.*, but was not troubled by that conclusion. According to the court, "Congress enacted the Communications Act and the

subsequent amendments thereto to protect the integrity of electronic communications from negligent as well as willful divulgences by intermediaries." *Id.*

Time Warner filed a timely petition for rehearing en banc, which the court of appeals denied. *See id.* at 60a.

REASONS FOR GRANTING THE WRIT

I. REVIEW IS REQUIRED TO RESOLVE A CONFLICT AMONG THE CIRCUITS CONCERNING THE PRECLUSIVE EFFECT OF A DISTRICT COURT JUDGMENT RESTING ON ALTERNATIVE GROUNDS.

A. As the Sixth Circuit expressly acknowledged, *see* Pet. App. 11a-12a, the courts of appeals disagree whether a determination in a federal district court's decision is entitled to preclusive effect if it is one of two or more alternative grounds that are independently sufficient to support the judgment. The D.C., Second, and Ninth Circuits have embraced a rule under which, "if a court decides a case on two grounds, *each* is a good estoppel." *Irving Nat'l Bank v. Law*, 10 F.2d 721, 724 (2d Cir. 1926) (L. Hand, J.) (emphasis added).[3] In declining to accord preclusive effect to the Coach's Corner court's Section 605 holding, the Sixth Circuit sided with the Fourth, Fifth, Seventh, and Tenth Circuits, under whose

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[3] *See Yamaha*, 961 F.2d at 255; *Bank of Guam v. Wiseman*, No. 87-1799, 1990 WL 140521, at *2 (9th Cir. Sept. 27, 1990) (judgment noted at 914 F.2d 1496 (table)); *Gelb v. Royal Globe Ins. Co.*, 798 F.2d 38, 45 (2d Cir. 1986), *cert. denied*, 480 U.S. 948 (1987); *Westgate-California*, 642 F.2d at 1176-77; *Williams*, 556 F.2d at 1154. The court of appeals correctly noted that the Seventh Circuit at one point adopted this view. *See* Pet. App. 12a (citing *Magnus Elecs.*, 830 F.2d at 1402); *see also Schellong v. INS*, 805 F.2d 655, 658-59 (7th Cir. 1986), *cert. denied*, 481 U.S. 1004 (1987). In a later en banc decision, however, the Seventh Circuit switched sides in the debate, without citing its prior decisions. *See Peabody Coal*, 117 F.3d at 1008.

approach neither alternative holding is afforded preclusive effect.[4] Commentators are likewise in disagreement.[5]

The outcome in this case plainly hinges on the resolution of the conflict. As the Coach's Corner court stated and the court of appeals acknowledged, the Coach's Corner decision rested on two alternative grounds that could each have borne the result alone. *See* Pet. App. 64a ("There are two bases for the decision."); *id.* at 8a ("[T]he court held that NSS had failed

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[4] *See Tuttle v. Arlington County Sch. Bd.*, 195 F.3d 698, 704 (4th Cir. 1999) (per curiam), *cert. dismissed*, 529 U.S. 1050 (2000); *Peabody Coal*, 117 F.3d at 1008; *Lisa Lee Mines v. Director, OWCP*, 86 F.3d 1358, 1363 (4th Cir. 1996) (en banc), *cert. denied*, 519 U.S. 1090 (1997); *Turney*, 898 F.2d at 1472 n.1; *Ritter*, 814 F.2d at 993; *Hicks v. Quaker Oats Co.*, 662 F.2d 1158, 1168-70 (5th Cir. Unit A Dec. 1981). The court below also pointed to decisions of the Third and Eighth Circuits, but those decisions by their terms applied state law. *See Arab African Int'l Bank*, 958 F.2d at 535; *Baker Elec. Coop.*, 28 F.3d at 1475-76.

[5] *Compare, e.g.*, *Restatement (Second) of Judgments* § 27 cmt. i (1982) ("If a judgment . . . is based on determinations of two issues, either of which standing independently would be sufficient to support the result, the judgment is not conclusive with respect to either issue standing alone.") *with, e.g.*, Jo Desha Lucas, *The Direct and Collateral Estoppel Effects of Alternative Holdings*, 50 U. Chi. L. Rev. 701, 729 (1983) ("Lucas") (taking contrary view); *Restatement of Judgments* § 68 cmt. n (1942) ("Where the judgment is based upon the matters litigated as alternative grounds, the judgment is determinative on both grounds, although either alone would have been sufficient to support the judgment. . . . [I]t must be said either that both are material to the judgment or that neither is material. It seems obvious that it should not be held that neither is material, and hence both should be held to be material."); Austin Wakeman Scott, *Collateral Estoppel By Judgment*, 56 Harv. L. Rev. 1, 11 (1942) ("It seems obviously fairer to hold that the judgment is conclusive as to both grounds rather than that it is conclusive as to neither."). The two leading civil-procedure treatises have noted the conflict but have declined to take a position on it. *See* 18 *Moore's Federal Practice* § 132.03[4][b][i]-[iv] (3d ed. 2001); 18 Charles A. Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice and Procedure* § 4421, at 208 (1981) ("Wright & Miller").

to state a claim under *both* the contracts at issue in that case *and* under 47 U.S.C. § 605."). As the court of appeals further recognized, the Section 605 issue resolved in the Coach's Corner decision is identical to the Section 605 issue raised in the instant case. *See id.* at 10a-11a. It follows that the Section 605 holding in the Coach's Corner decision would have been accorded preclusive effect in the D.C., Second, and Ninth Circuits. In the Sixth Circuit, it was not.

The conflict is no less implicated because the court of appeals said that it "d[id] not find it necessary to fully resolve" the issue before it by definitively choosing sides in the conflict. *Id.* at 13a. If anything, the Sixth Circuit exacerbated the discord among the circuits by purporting to adopt a third approach under which only "secondary" alternative holdings are denied preclusive effect. Thus, the instant case presents this Court with an ideal vehicle for resolving the conflict: it brings before the Court all three approaches in the debate.

It is equally clear that the conflict, which is fully mature, should not be permitted to fester. On numerous occasions, this Court has granted certiorari to resolve conflicts of authority concerning issues of res judicata and collateral estoppel.[6] Those doctrines are not mere rules of procedure as to which disagreement is harmless so long as knowledgeable litigants can adjust their conduct to accommodate different approaches. Rather, these doctrines unalterably determine when relitigation is permitted. If these rules differ among the circuits, substantively different outcomes will result. Indeed, the existing conflict encourages forum shopping by litigants seeking to take advantage of the most hospitable preclusion rules. Only this Court can end that state of affairs.

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[6] *See, e.g., Allen v. McCurry*, 449 U.S. 90 (1980); *Standefer v. United States*, 447 U.S. 10 (1980); *Parklane Hosiery Co. v. Shore*, 439 U.S. 322 (1979); *Blonder-Tongue Labs., Inc. v. University of Illinois Found.*, 402 U.S. 313 (1971).

B. Review is particularly appropriate because the court of appeals' refusal to accord preclusive effect to alternative holdings is not only contrary to the decisions of numerous other circuits but also incorrect. As this Court has explained, the doctrine of issue preclusion "is central to the purpose for which civil courts have been established, the conclusive resolution of disputes within their jurisdictions." *Montana v. United States*, 440 U.S. 147, 153 (1979). The doctrine "relieve[s] parties of the cost and vexation of multiple lawsuits, conserve[s] judicial resources, and, by preventing inconsistent decisions, encourage[s] reliance on adjudication." *Allen*, 449 U.S. at 94. Those interests in fairness and efficiency are no less implicated where a judgment rests on alternative grounds. To the contrary, a litigant whose claim is rejected on two grounds should have no greater entitlement to a second bite at the apple than a litigant whose claim was rejected on only one ground.

To the extent that they have sought to explain why alternative holdings should be afforded less preclusive effect than holdings standing alone, proponents have relied on two arguments.[7] *First*, these proponents (including the court below) have argued that preclusion would be unfair to losing litigants, on the theory that such litigants have no realistic opportunity to appeal. If one of the alternative holdings is so strong as to be unassailable, the theory runs, appeal of the other is futile. *Second*, proponents have argued that an alternative ground may not be as well-considered as a single

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[7] *See Hicks*, 662 F.2d at 1168-70; *Restatement (Second) of Judgments* § 27 cmt. i. It is noteworthy that both *Hicks* and the *Restatement (Second)* relied heavily on a Second Circuit decision — *Halpern v. Schwartz*, 426 F.2d 102 (2d Cir. 1970) — that the Second Circuit itself later expressly repudiated. *See generally* Lucas at 729 (describing the "star-crossed love affair between the Restatement (Second) and *Halpern*").

ground determining the outcome by itself. On this reasoning, an alternative ground is akin to *dictum*.[8]

Neither argument is persuasive. *First*, there is no merit to the suggestion that losing litigants have no incentive to appeal. It is true that, if one of the alternative grounds is unassailable, an appellant is unlikely to obtain a reversal. But a court of appeals' affirmance on only one alternative ground deprives the un-affirmed ground of collateral-estoppel effect. *See Restatement (Second) of Judgments* § 27 cmt. o; Lucas at 706 n.29. Thus, a losing litigant faced with alternative holdings does have an incentive to appeal, and preclusion is not unfair — let alone so unfair as justifying the countervailing unfairness of burdening the prevailing litigant with an entirely new suit.[9] It is no answer to say that appeals taken for the purpose of inducing a one-ground-only affirmance waste judicial resources. *See Hicks*, 662 F.2d at 1169. Even in the rare case in which an appellant has no hope at all of prevailing on each ground, the expense in terms of judicial economy is markedly lower than that incurred when the same litigant is allowed to relitigate from scratch. *See* Lucas at 713-14.

More fundamentally, even if the losing litigant had no incentive to appeal, preclusive effect should not be denied. This Court has disclaimed the "suggest[ion] that the availability of appellate review is always an essential predicate of estoppel." *Standefer*, 447 U.S. at 23 n.18. Surely, an incentive (as distinguished from the ability) to appeal is even less essential. *See Pinkney v. Keane*, 920 F.2d 1090, 1096 (2d Cir. 1990) ("[W]hile lack of incentive to litigate vigorously may render the collateral estoppel doctrine inoperative, lack

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[8] It is well-established that *dictum* is not entitled to preclusive effect. *See, e.g.*, Wright & Miller at 194.

[9] Besides, it is difficult to see why judicial sympathy is due to a party who litigated to a conclusion a claim that was apparently so meritless that it stands no chance of being revived on appeal.

of incentive to appeal does not have the same effect. Rather, failure to appeal an adverse judgment negates the preclusive effect of that judgment only when review was unobtainable as a matter of law. Where review is available but is not sought, estoppel applies.") (footnote, citations, and internal quotation marks omitted), *cert. denied*, 501 U.S. 1217 (1991).

Second, it cannot credibly be argued that alternative holdings should be denied collateral-estoppel effect out of concern that they do not reflect thoughtful consideration. It is well-settled that alternative holdings are entitled to full *stare decisis* effect. *See, e.g., Massachusetts v. United States*, 333 U.S. 611, 623 (1948); *United States v. Title Ins. & Trust Co.*, 265 U.S. 472, 486 (1924); *Natural Resources Defense Council, Inc. v. NRC*, 216 F.3d 1180, 1189 (D.C. Cir. 2000). If alternative holdings deserve *stare decisis* effect, they also deserve collateral-estoppel effect. *See* Lucas at 703.

The "no thoughtful consideration" argument is further undermined by its proponents' position on the preclusive effect of alternative holdings of appellate courts. Although they would not accord preclusive effect to alternative holdings of trial courts, they *would* accord such effect to alternative holdings of appellate courts. *See Restatement (Second) of Judgments* § 27 cmt. o. There simply is no basis for any assumption that trial courts consider their decisions less carefully than appellate courts. More generally, it is unclear why alternative holdings of appellate courts, which are subject to the same "lack of incentive to appeal" concerns as alternative holdings of trial courts, should nonetheless be accorded more powerful preclusive effect.

C. Even less persuasive is the court of appeals' attempt to find a middle road — in which a "primary" alternative ground may have preclusive effect but a "secondary" ground does not. *First*, that theory plainly cannot be grounded on the view that "secondary" holdings are more akin to *dictum* than

"primary" ones: the principle that alternative holdings are entitled to full *stare decisis* effect applies with as much force to "secondary" holdings as it does to "primary" ones. *See Richmond Screw Anchor Co. v. United States*, 275 U.S. 331, 340 (1928) ("[i]t is true that in this case the other reason was more dwelt upon and perhaps it was more fully argued and considered than section 3477, but we cannot hold that the use of the section in the opinion is not to be regarded as authority"). Plainly, whether a holding constitutes *dictum* cannot depend on the order in which grounds are presented or the amount of ink that is spilled.

Second, the court of appeals' primary/secondary distinction renders intolerably equivocal an inquiry that by its very nature should be clear and certain.[10] Even if the Sixth Circuit's rule had been established in advance, it seems unlikely that either NSS or Time Warner would have been able to predict with certainty whether the court of appeals would have found the Coach's Corner court's Section 605 holding to be so much less prominent than the contractual holding as to be unworthy of preclusive effect. Because the collateral-estoppel inquiry must be predictable if it is to fulfill its office of forestalling repetitive litigation, the court of appeals' approach must be rejected.

II. REVIEW IS FURTHER REQUIRED TO CORRECT THE COURT OF APPEALS' MISTAKEN INTERPRETATION OF SECTION 605.

The Court should also grant review in connection with the court of appeals' expansive and unprecedented construction of

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[10] "[I]t is in the interest of predictability and simplicity for the result of non-preclusion to be uniform." *Restatement (Second) of Judgments* § 27 cmt. i; *see also* Wright & Miller at 208 ("the parties should be entitled to a clear rule"); Lucas at 729 (cautioning against introducing "uncertainty where certainty is crucial").

Section 605. The court of appeals held that a company holding a contractual right to exhibit particular satellite-delivered television programming in commercial establishments has standing to bring a federal piracy action against a cable operator that, having a contractual right to receive an entirely separate satellite feed of the same programming for distribution to residential subscribers, inadvertently provides it to a commercial establishment. That erroneous interpretation creates a federal forum (in which attorneys' fees, liquidated damages, and a strict liability standard are available) for disputes that previously were only of state concern. Moreover, this reading is at odds with the statute's language and purpose and will have troubling consequences for the entire cable industry. It therefore independently warrants review.[11]

A. The proscription now contained in the first sentence of Section 605(a) was first enacted as part of the Radio Act of 1912. It was intended to strike at a serious problem affecting electronic communications at the time: telegraph workers would sometimes divulge to unauthorized third parties sensitive information passing through their hands.[12] Insofar as

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[11] Besides being certworthy in its own right, this second question may aid the Court in adjudicating the first question. Although petitioner believes that the court of appeals' approach to collateral estoppel — under which preclusive effect hinges on a holding's relative "primacy" — is misguided, that approach is one of the three strands in the extant conflict. Granting review in connection with this second question will permit this Court to assess the court of appeals' approach in a concrete legal setting: it may help the Court in determining whether the court of appeals was correct in labeling the Section 605 ground as being merely secondary and, if so, what consequences should flow from that label.

[12] *See* H.R. Rep. No. 582, 62d Cong., 2d Sess. 5 (1912); *Home Box Office, Inc. v. Advanced Consumer Tech.*, 549 F. Supp. 14, 18 (S.D.N.Y. 1981); Kent R. Middleton, *Radio Piracy Under Section 705(a): An Unconstitutional Oxymoron*, 9 Admin. L.J. Am. U. 583, 591 & n.26 (1995) ("Middleton"); Lauritz S. Helland, *Section 705(a) in the Modern*

telegraphy by wire was involved, the problem had long been addressed by state-law measures. *See* Middleton at 592. When Congress took regulatory control of the new radio medium in 1912, it enacted an analogous ban for telegraphic transmissions by radio.[13]

With the later enactment of the Radio Act of 1927, Congress added the second, third, and fourth sentences to Section 605(a). Those sentences (which are not directly at issue in this case) were aimed at a different, but related, problem: they made unlawful the interception of radio messages by persons other than their intended recipients. *See Advanced Consumer Tech.*, 549 F. Supp. at 18-19. Although these provisions were intended primarily to safeguard the privacy of point-to-point radio communications, they have continuing significance: in recent decades, they have been invoked by providers of video programming seeking to combat unauthorized interception of their satellite signals. *See, e.g., Entertainment & Sports Programming Network, Inc. v. Edinburg Community Hotel, Inc.*, 735 F. Supp. 1334, 1338 (S.D. Tex. 1986); *American Television & Communications Corp. v. Floken, Ltd.*, 629 F. Supp. 1462, 1470 (M.D. Fla. 1986).

As originally enacted, Section 605 did not contain a provision expressly creating a private right of action. Courts,

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Communications World: A Response to Di Geronimo, 40 Fed. Comm. L.J. 115, 115-16 (1988) ("Helland").

[13] As enacted in 1912, the statute provided: "No person or persons engaged in or having knowledge of the operation of any station or stations shall divulge or publish the contents of any messages transmitted or received by such station, except to the person or persons to whom the same may be directed, or their authorized agent, or to another station employed to forward such message to its destination, unless legally required so to do by the court of competent jurisdiction or other competent authority." Ch. 287, § 4, reg. 19, 37 Stat. 302, 307.

however, found such a right of action implied. *See, e.g., Chartwell Communications Group v. Westbrook*, 637 F.2d 459, 466 (6th Cir. 1980) (collecting cases); *Reitmeister v. Reitmeister*, 162 F.2d 691, 694 (2d Cir. 1947) (L. Hand, J.). Congress added a statutory provision that codified existing law in 1984. That provision, Section 605(e)(3)(A), provides that "[a]ny person aggrieved by any violation of subsection (a) . . . may bring a civil action in a United States district court." 47 U.S.C. § 605(e)(3)(A). It applies to each of the four sentences of Section 605(a).[14]

B. The wording of Section 605(e)(3)(A) is similar to that of many other federal statutes using "person aggrieved" language. *See, e.g.*, 5 U.S.C. § 702 (Administrative Procedure Act ("APA")); 28 U.S.C. § 2344 (Hobbs Act); 47 U.S.C. § 402(b)(6) (Communications Act). In interpreting such statutes, this Court has invariably recognized certain important standing limitations. One such limitation is that "the plaintiff must establish that the injury he complains of . . . falls within the 'zone of interests' sought to be protected by the statutory provision whose violation forms the legal basis for his complaint." *Lujan v. National Wildlife Fed'n*, 497 U.S. 871, 883 (1990); *see Bennett v. Spear*, 520 U.S.

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[14] In 1988, Congress added a new Section 605(d)(6) providing that "the term 'any person aggrieved' shall include any person with proprietary rights in the intercepted communication by wire or radio, including wholesale or retail distributors of satellite cable programming." 47 U.S.C. § 605(d)(6). Before the amendment, a district court had held that cable operators lacked standing to sue firms that, by selling satellite-dish equipment, aided in the interception — in violation of Section 605(a)'s second and third sentences — of satellite signals bound for cable operators. *See Air Capital Cablevision, Inc. v. Starlink Communications Group, Inc.*, 601 F. Supp. 1568, 1571-72 (D. Kan. 1985). The amendment overruled that decision. *See Showtime/The Movie Channel, Inc. v. Covered Bridge Condo. Ass'n, Inc.*, 881 F.2d 983, 986 (1989), *opinion vacated and appeal dismissed*, 895 F.2d 711 (11th Cir. 1990).

154, 175 (1997); *Clarke v. Securities Indus. Ass'n*, 479 U.S. 388, 394-403 (1987).

The "zone of interests" limitation ensures that litigants are not permitted to subvert a statute's purposes by enlisting it to advance interests other than those that Congress sought to promote. As the Court explained in *Lujan*: "[F]or example, the failure of an agency to comply with a statutory provision requiring 'on the record' hearings would assuredly have an adverse effect upon the company that has the contract to record and transcribe the agency's proceedings; but since the provision was obviously enacted to protect the interests of the parties to the proceedings, and not those of the reporters, that company would not be 'adversely affected within the meaning' of the statute." 497 U.S. at 883; *see also Air Courier Conference of Am. v. American Postal Workers Union*, 498 U.S. 517, 525-26 (1991) (postal workers lacked standing to enforce postal monopoly statutes because "congressional concern was not with opportunities for postal workers but with the receipt of necessary revenues for the Postal Service").

Although this Court first "applied the zone-of-interests test to suits under the APA, . . . later cases have applied it also in suits not involving review of federal administrative action, and have specifically listed it among other prudential standing requirements of general application." *Bennett*, 520 U.S. at 163 (citations omitted). Indeed, because "Congress legislates against the background of [the zone of interests] doctrine," that doctrine "applies unless it is expressly negated." *Id.* Accordingly, lower courts have recognized that standing under Section 605(e)(3)(A) is likewise subject to a "zone of interests" limitation. *See, e.g., Sioux Falls Cable Television v. South Dakota*, 838 F.2d 249, 251-52 (8th Cir. 1988); *Showtime/The Movie Channel, Inc. v. Covered Bridge Condo. Ass'n, Inc.*, 693 F. Supp. 1080, 1083 (S.D. Fla. 1988), *aff'd in part, appeal dismissed in part on other grounds*, 881 F.2d

983 (1989), *opinion vacated and appeal dismissed*, 895 F.2d 711 (11th Cir. 1990); *Quincy Cablesystems, Inc. v. Sully's Bar, Inc.*, 650 F. Supp. 838, 842-44 (D. Mass. 1986); *Floken*, 629 F. Supp. at 1471-72.[15]

C. Given the background of Section 605, *see supra*, pp. 19-20, it is plain that Congress's purpose in enacting the first sentence of Section 605(a) was to safeguard the privacy and integrity of electronic communications.[16] Thus, standing is appropriate only for parties with a reasonable expectation to that effect. For example, in the telegraph context, standing plainly was appropriate for telegraph companies and for senders and addressees of telegrams — but not for strangers to the diverted communications (say, persons whose names happen to be mentioned in the diverted communications). Similarly, in the context of satellite signals, proper plaintiffs include satellite common carriers,[17] programming producers that act as the programming's senders,[18] and cable operators

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[15] Indeed, in its court of appeals brief, NSS conceded that, to have standing, it needed to show that it sought protection of a claim "within the zone of interests sought to be protected" by Section 605(a). Brief of Appellee National Satellite Sports, Inc. at 27, *National Satellite Sports, Inc. v. Eliadis, Inc., et al.*, Nos. 00-3013 & 00-3437 (6th Cir. filed July 24, 2000); *see id.* at 25.

[16] *See, e.g., Goldman v. United States*, 316 U.S. 129, 133 (1942) ("The protection intended and afforded by the statute is of the means of communication and not of the secrecy of the conversation."); *Reitmeister*, 162 F.2d at 694 ("[t]he interest protected by the section is the sender's"); Helland at 126 ("the statute protects the medium and not the message").

[17] *See, e.g., Edinburgh Community Hotel*, 735 F. Supp. at 1338 (satellite common carrier is the "intended beneficiar[y] of the protections of the statute, and clearly ha[s] standing to protect [its] transmissions").

[18] *See, e.g., National Football League v. Alley, Inc.*, 624 F. Supp. 6, 9-10 (S.D. Fla. 1983) ("Plaintiffs have demonstrated important economic and professional interests in the integrity of the communications system that distributes their entertainment product. Such interests are within the protective sphere of Section 605."); *Home Box Office, Inc. v. Corinth*

that are the satellite signals' addressees.[19] Again, however, Congress could not have intended that strangers to a diverted communication be within the zone of interests protected by the first sentence of Section 605(a), simply because they have some indirect economic interest in the communication's content.

The court of appeals erred, therefore, in conferring standing upon respondent NSS. NSS was neither the sender, the transmitter, nor the addressee of the diverted communication. Instead, it had exhibition rights in an entirely different and separate satellite signal that happened to carry the same television programming. Even assuming that Time Warner's inadvertent authorization of the Melody Lane Lounge to view

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Motel, Inc., 647 F. Supp. 1186, 1189 (N.D. Miss. 1986) ("Plaintiffs, HBO, ESPN, and Showtime, as senders of the satellite transmissions, are intended beneficiaries of the protection of the statute and have standing under 47 U.S.C. § 605."); *Edinburgh Community Hotel*, 735 F. Supp. at 1338 ("As senders of the subject satellite communications, HBO, ESPN and SSS are intended beneficiaries of the protections of the statute, and clearly have standing to protect their transmissions."); *National Football League v. McBee & Bruno's*, 621 F. Supp. 880, 890-91 (E.D. Mo. 1985) (same), *aff'd in part, rev'd in part on other grounds*, 792 F.2d 726 (8th Cir. 1986).

[19] *See, e.g., Edinburg Community Hotel*, 735 F. Supp. at 1338 ("as an intended, authorized receiver," cable operator "has demonstrated important economic interests in protecting the integrity of the communications system which distributes the programming"); *Quincy Cablesystems*, 650 F. Supp. at 844 ("Quincy, as a cable system operator, has significant economic and professional interests in the integrity of the communications systems."); *Corinth Motel*, 647 F. Supp. at 1189 (intended recipient of intercepted signal had "significant proprietary right"); *Floken*, 629 F. Supp. at 1471 (intended recipient of intercepted signal had "significant 'economic and professional interests in the integrity of the communications systems'").

the boxing match amounted to a violation of Section 605(a),[20] conferring standing upon persons like NSS in effect transmogrifies the statute from a narrow anti-piracy measure into a strict-liability statute that does nothing to serve the statute's purposes. *See* Helland at 127 & n.65.

It is no answer to say, as did the court of appeals, that "the definition of a 'person aggrieved' in § 605(d)(6) is non-exclusive," Pet. App. 15a, and that, by adding that definition in 1988, Congress sought to "expan[d], not limi[t], the group of persons who have standing to sue for its violation," *id.* at 21a. Even if the court of appeals correctly interpreted Congress's intent in adding the 1988 amendment, and even if a plaintiff need not fit within the categories of parties specifically granted standing by that measure, it simply does not follow that *any* person — no matter how remote from the injury the statute sought to prevent — should be entitled to sue. To the contrary, Section 605(d)(6) expressly affords standing only to entities seeking to combat unauthorized interceptors' acts of communications piracy. There is no suggestion that Congress sought to provide legitimate programming distributors with a federal-court forum to settle

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[20] This is doubtful to say the least. The statute is violated only if a person divulges the contents of a communication "to any person other than the addressee." 47 U.S.C. § 605(a). Cable operators receive programming by satellite from programming suppliers and then independently determine to whom they will address it. Thus, it is wrong to view the end user as an "addressee" of the programming supplier; instead, the end user is the addressee of the cable operator (who in turn is the addressee of the programming supplier). *See Smith v. Cincinnati Post & Times-Star*, 475 F.2d 740, 741 (6th Cir. 1973) (per curiam) (no violation of first sentence of Section 605(a) where addressee of electronic communication forwarded message to third party); *People v. Wilson*, 94 Cal. Rptr. 923, 925-26 (Cal. Ct. App. 1971) (same). To be sure, by addressing programming to a particular subscriber, a cable operator may breach its contract with its programming supplier. But that is a matter of concern only to state contract law, not to Section 605(a).

disputes concerning the extent of and infringement on each others' contractual rights. Thus, the 1988 amendment counsels against — not in favor of — the broad construction of the "person aggrieved" term that the court of appeals embraced in the decision below.[21]

D. The court of appeals' erroneous decision has far-reaching and alarming consequences. Disputes like the one before the Court — quarrels in which one programming distributor accuses another of straying beyond the scope of a programming-distribution license — have traditionally been resolved under basic principles of state contract law. Under the court of appeals' decision, however, distributors may convert these garden-variety contract disputes into suits in federal court governed by federal law. Plainly, statutes should not be read to effectuate such a drastic readjustment of state and federal responsibilities in the absence of any express indication of congressional intent to that effect. *See, e.g., BFP v. Resolution Trust Corp.*, 511 U.S. 531, 543 (1994); *Kelly v. Robinson*, 479 U.S. 36, 49 n.11 (1986).

The consequences of the court of appeals' decision are all the more pronounced because Section 605 provides for strict liability, statutory damages, and mandatory attorneys' fees. *See* 47 U.S.C. §§ 605(e)(3)(B)(iii), 605(e)(3)(C)(i)(II). Undoubtedly, the court of appeals' decision will trigger a flood of federal suits by programming distributors like NSS,

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[21] *See, e.g., Circuit City Stores, Inc. v. Adams*, 121 S. Ct. 1302, 1308-09 (2001) ("[W]here general words follow specific words in a statutory enumeration, the general words are construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words.") (internal quotation marks omitted); *United States v. Locke*, 529 U.S. 89, 105 (2000) ("words of a statute should be interpreted consistent with their neighbors to avoid giving unintended breadth to an Act of Congress").

which is already "no stranger to litigation."[22] In the instant case, NSS won damages of $4,500 and attorneys' fees and costs exceeding $26,000 — in connection with programming that the Melody Lane Lounge would not have ordered if it would have been required to pay the roughly $1,000 that NSS charged for it. Thus, for firms like NSS, the court of appeals' decision makes litigation more rewarding than tending to their business.

Finally, such litigation unfairly saddles cable operators with "a federal mandate of infallibility." Pet. App. 27a. Cable systems' architecture is such that every subscriber receives the same signal. Cable operators rely on set-top boxes — electronically instructed from databases maintained at the central "head-end" — to unscramble only the programming to which a particular subscriber is entitled. With more than 67

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[22] *National Satellite Sports, Inc. v. Marzullo*, No. 96 C 6621, 1998 WL 526570, at *4 n.3 (N.D. Ill. Aug 17, 1998); *see also, e.g., National Satellite Sports, Inc. v. My Friend's Place*, No. 00 C 6999, 2001 WL 826919 (N.D. Ill. July 20, 2001); *National Satellite Sports, Inc. v. Marcus Cable Props., Inc.*, No. 99 C 5588, 2000 WL 1774075 (N.D. Ill. Dec. 1, 2000); *National Satellite Sports, Inc. v. Comcast Satellite Communications, Inc.*, No. CIV. H-00-261, 2000 WL 1717304 (D. Md. Nov. 15, 2000); *National Satellite Sports, Inc. v. Kyriakoulis*, No. 97 C 3772, 1998 WL 474116 (N.D. Ill. Aug. 4, 1998). Other distributors are equally litigious. *See, e.g., Kingvision Pay Per View, Ltd. v. Duermeier*, 24 F. Supp. 2d 1179 (D. Kan. 1998); *Kingvision Pay Per View, Ltd. v. Williams*, 1 F. Supp. 2d 1481 (S.D. Ga. 1998); *That's Entertainment, Inc. v. J.P.T., Inc.*, 843 F. Supp. 995 (D. Md. 1993); *Joe Hand Promotions, Inc. v. Rennard Street Enters., Inc.*, 975 F. Supp. 746 (E.D. Pa. 1997); *Joe Hand Promotions, Inc. v. Burg's Lounge*, 955 F. Supp. 42 (E.D. Pa. 1997); *Joe Hand Promotions v. D.M.B. Ventures, Inc.*, Nos. CIV. A. 93-2656 & 93-3141, 1995 WL 328399 (E.D. La. May 31, 1995); *Joe Hand Promotion, Inc. v. 4300, Inc.*, No. CIV. A. 94-4368, 1995 WL 115405 (E.D. Pa. Mar. 16, 1995).

million cable subscribers nationally,[23] it is simply inevitable that cable operators' subscriber records will occasionally contain erroneous information.[24] Under the court of appeals' approach to standing, any erroneous entry exposes cable operators to suit in federal court, strict liability, statutory damages, and mandatory attorneys' fees. Thus, the court of appeals' mistaken decision threatens the economic viability of providing pay-per-view programming of the kind here at issue, and is therefore of broad significance to the cable industry as a whole.

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[23] *See Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Seventh Annual Report, 16 FCC Rcd 6005, Table C-1 (2001). Almost one million of these subscribers are commercial establishments. *See* Kagan World Media, *Broadband Cable Financial Databook 2001*, at 11 (2001).

[24] That is particularly true because commercial establishments often intentionally misrepresent themselves as residential subscribers or even extend a cable wire from a nearby residence. *See, e.g., Duermeier*, 24 F. Supp. 2d at 1181; *Taco Rapido*, 988 F. Supp. at 109; *J.P.T.*, 843 F. Supp. at 997-98; *D.M.B. Ventures*, 1995 WL 328399, at *6.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

RICHARD W. CLARY
GARY A. BORNSTEIN
CRAVATH, SWAINE & MOORE
Worldwide Plaza
825 Eighth Avenue
New York, NY 10019
(212) 474-1000

MARC APFELBAUM
JEFFREY M. ZIMMERMAN
CRAIG A. GOLDBERG
TIME WARNER CABLE
290 Harbor Drive
Stamford, CT 06902
(203) 328-0600

HENK BRANDS
Counsel of Record
COLIN S. STRETCH
KELLOGG, HUBER, HANSEN, TODD & EVANS, P.L.L.C.
1615 M Street, N.W.
Suite 400
Washington, D.C. 20036
(202) 326-7900

PAUL T. CAPPUCCIO
EDWARD J. WEISS
AOL TIME WARNER INC.
75 Rockefeller Plaza
New York, NY 10019
(212) 484-8000

Counsel for Petitioner

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